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IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 31

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS.

SHORT STATEMENT OF THE CASE.

Respondents brought suit in the Court of Claims of the United States as Receivers for The D. C. Engineering Company, Inc., hereinafter referred to as Respondent, to recover excess costs incurred by that Company as the result of delays caused by the Government incident to the construction of the Veterans' Administration Hospital building at Togus, Maine, in the years 1932 and 1933.

Judgment in favor of Respondents in the amount of $9,349.95 was entered by the Court of Claims December 1, 1941 (R. 36), and the petition of the Government for a writ of certiorari was granted by this Court April 13, 1942.

STATEMENT OF FACTS.

While we agree, with minor exception, with the statement of facts contained in the brief for the United States (Br. pp. 2-8), the essential facts will be here briefly restated for convenient reference.

Respondent's contract with the Government called for the installation of all plumbing, heating and electrical equipment in the Hospital building (R. 20). An independent contract was made by the Government with Charles Smith & Sons, called the General Contractor, for the general construction work, including particularly the excavation for foundations and the erection of the building proper (R. 19). There was no privity of contract between the two Contractors, although Respondent's work was necessarily to proceed along with that of the General Contractor (R. 12, 19) and was to be completed not later than the time provided for completion in the contract for General Construction.

Although the contract for General Construction provided for completion within 250 days after May 9, 1932, the date of notice to proceed, or by January 14, 1933, the building was not finished and finally accepted by the Government until October 1, 1933, a total of 510 days as against the originally contemplated 250 days, or 260 days late (R. 19-20, 25, 27). This delay resulted primarily, if not solely, from the discovery of unsatisfactory subsurface conditions, which necessitated a complete relocation of the building (R. 23).

Pursuant to the provisions of the contract, the Government, on May 12, 1932, gave Respondent notice to proceed, stating that:

> "It will be noted that the contract provides for completion of the work at a date not later than that pro-

vided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932" (R. 20).

After receipt of advice from the General Contractor that its work would be sufficiently progressed by June 6, 1932, to enable Respondent to commence work under its contract, Respondent's Superintendent moved to and established headquarters at the job on June 6, 1932, having shipped large quantities of tools and equipment to the job shortly prior thereto (R. 22-23).

Respondent then, and only then, learned that unsatisfactory subsurface conditions had been discovered. "Instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications", the Government discovered soft sand, water and quicksand and on or about June 4th, the Contracting Officer stopped all work pending decision on a remedy for the situation (R. 23).

Following conferences with the General Contractor and Respondent, the Contracting Officer determined to relocate the building and proceed with the construction work despite the approaching winter weather. At such conferences, Respondent protested to the Contracting Officer that it should not be required to proceed with the work called for by its contract without the payment of extra compensation for the delays and increased costs under the circumstances, and insisted that an equitable adjustment be made by the Contracting Officer under the terms of the contract to meet such increased costs (R. 24).

The Contracting Officer ruled, however, that as no actual work on the building had been performed by Respondent up to the time that work under the General Contract was stopped on June 4, 1932, "no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff (Respondent) would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor

and make claim in the United States Court of Claims for any excess costs incurred" (Find. 6, R. 24).

New plans and drawings were prepared for the relocation of the building and excavation for the new foundations was commenced by the General Contractor August 9, 1932 (R. 23). The General Contractor had not made sufficient progress to enable Respondent to commence its work until October 8, 1932 (R. 24).

As the result of this delay, the major part of Respondent's work was thrown in the severe winter months, whereas under the original schedule of construction, the building would have been under cover before the rigorous winter weather set in, and the efficiency of Respondent's mechanics and laborers engaged in the plumbing and heating work was reduced 50 per cent during that period by reason of having to work in the open in the freezing and subfreezing weather (R. 25).

At the time of preparing its bid and prior to the execution of its contract, Respondent conferred with the Contracting Officer concerning the time when construction would commence and the period of the year during which it would be prosecuted and was advised by him that work would be commenced as early in the spring of 1932 as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months (R. 21).

Following the relocation of the Hospital building site, made necessary by the faulty subsurface conditions, the contract of the General Contractor was amended by various change orders, resulting in a net increase in that contract of $103,489.49 and an extension of 212 days, to August 14, 1933, for completion, the largest item in such change orders being one for "extra work and *delay*" in the amount of $68,360.57, with an extension of 125 days (R. 24).

Certain plumbing and heating fixtures were eliminated by the relocation of the building, and the Contracting Officer issued various change orders amending Respondent's con-

tract resulting in a net reduction of $1,121.18, that is from $89,500 to $88,378.82 (R. 26).

By stipulation filed in the Court below and as found by that Court, the cost to Respondent of performing its contract, including overhead and profit, was $114,423.46, or $26,044.64 in excess of the amended contract price of $88,378.82 (Find. 10, R. 26).

The Court found that the lowered efficiency of Respondent's mechanics working in the open during the winter months resulted in additional labor costs to Respondent of $5,192.49; that the salary of Respondent's Superintendent for the period of 126 days from June 4, 1932 to October 8, 1932, was $1,170, and that during this delay period of 126 days Respondent's actual overhead expenses, exclusive of profit and the above mentioned salary of its Superintendent, was $2,987.46 (R. 25).

OPINIONS OF THE COURT BELOW.

The Court awarded judgment in favor of Respondent in the sum of $9,349.95, the total of the foregoing amounts (R. 32).

In the main opinion, written by Judge Littleton, it is stated that the difference of $13,621.61 between Respondent's total loss of $26,044.64 and the amount of the judgment resulted from inadequate estimates of labor and material costs and the failure to secure the ordinary discounts because of its financial condition (R. 31-32), although there is not even a suggestion of such facts in any of the numerous special findings of fact made by the Court.

It also should be noted that while the judgment includes an allowance for additional *labor costs* caused by the inefficiency of the workmen during the winter months, no allowance whatever was made for the additional time thereby required for the completion of the contract and the Superintendent's salary, overhead, etc. which Respondent was required to bear for that additional time.

Of the 260 extra days required for the completion of the contract, the Government contended, and the Court found, that 48 days delay was caused jointly by the General Contractor and Respondent (R. 25-26), leaving 212 days for which extensions were granted because of changes in the specifications by the Government. The judgment below included an allowance to Respondent for its superintendence, overhead, etc. for the period from June 4, 1932 to October 8, 1932, of 126 days, but nothing for the additional 86 days.

Judge Littleton found that Respondent's contract and specifications, considered in connection with the representations in the specifications relating to the General Contractor, made the Government liable for Respondent's excess costs which resulted from conditions for which Respondent was not responsible and which it was not required to take into consideration in submitting its bid, and that in accordance with Article 4 of the contract, the Government was bound to make an equitable adjustment of Respondent's excess costs resulting from the discovery of the unsatisfactory subsurface conditions (R. 29).

The basis of Judge Littleton's opinion is not, as the Government seems to contend, the purely negative proposition that the Government is liable for delays because nothing in the contract relieves it of such a liability. At the outset (R. 27), the opinion succinctly states the reasoning by saying:

> "Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled to recover $9,349.95 of the total excess cost of $26,044.64 incurred."

The following cases are then cited:

United States v. *Smith*, 94 U. S. 214, 217.
Mueller v. *United States*, 113 U. S. 153, 156.

Dermott v. *Jones*, 23 How. 220, 231, 233.
O'Brien v. *Miller*, 168 U. S. 287, 297.
Green County, Ky. v. *Quinlan*, 211 U. S. 582, 594.
American Surety Co. v. *Pauly* (No. 1), 170 U. S. 133, 144.
United States v. *Spearin*, 248 U. S. 132.
Wood v. *Fort Wayne*, 119 U. S. 312, 321, 322.

The opinions in these cases and especially the passages appearing on the pages to which Judge Littleton refers, show that the basis of the lower Court's judgment may be summarized as follows:

Taking the contract as a whole in the light of all of the circumstances out of which it developed,[1] and construing it most strongly against the Government, which prepared it,[2] and in the light of the rule that one party may not with justice accept the benefit of performance without paying for it,[3] the United States is responsible for defects in the specifications which it prepared and which the contractor was bound to rely upon and follow,[4] and is liable for the delay in performance caused by such defects, having thus without justification interfered with the performance of the original contract within the time stated.[5]

Judge Green, in his concurring opinion, agreed with all of the conclusions of Judge Littleton, but made the further observation that in his opinion the Government was liable to Respondent for all excess costs resulting from the stop order of June 4, 1932, of the Contracting Officer, which constituted a breach of the contract, the time of completion be-

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[1] *O'Brien* v. *Miller*, 168 U. S. 287, 297; *Green County, Ky.* v. *Quinlan*, 211 U. S. 582, 594.

[2] *American Surety Co.* v. *Pauly*, (No. 1), 170 U. S. 133, 144. See also *Garrison* v. *United States*, 7 Wall. 688; *Marietta, Mfg. Co.* v. *United States*, 73 Ct. of Cls. 528, 546; *Bethlehem Steel Co.* v. *United States*, 51 Ct. of Cls. 394, 398, Aff'd. 246 U. S. 523.

[3] *Dermott* v. *Jones*, 23 How. 220, 231, 233.

[4] *United States* v. *Spearin*, 248 U. S. 132; *Wood* v. *Fort Wayne*, 119 U. S. 312, 321, 322.

[5] *United States* v. *Smith*, 94 U. S. 214, 217; *Mueller* v. *United States*, 113 U. S. 153, 156.

ing one of the specifications thereof and described as being of the essence, and that in any event, the Contracting Officer failed in his duty to make an equitable adjustment under Article 3 or 4 of the contract (R. 32-33).

Chief Justice Whaley and Judge Jones concurred in the first part of Judge Green's opinion, but expressed the belief that Articles 3 and 4 of the contract had no application (R. 47).

Judge Madden dissented on the ground that the Government should not be held responsible for Respondent's excess costs due to delay "which was no one's fault," (apparently disregarding the finding that instead of "proper foundation bearings, *as shown in the drawings and as stated in the specifications*, soft sand, and a great deal of water and quicksand were encountered" (R. 23)), and that there was no obligation on the part of the Contracting Officer to make an equitable adjustment in favor of Respondent because of the necessary changes made in the specifications having "reference only to the contractor whose work is directly affected by the discovery of the unexpected condition" (R. 34-35), (although all of the specifications were made a part of Respondent's contract (R. 7)).

SUMMARY OF ARGUMENT.

I. The United States warranted the adequacy of its plans and specifications for the construction of the Hospital building and is liable in breach of contract for damages resulting from errors in such specifications. The specifications and drawings relating to foundation bearings admittedly were erroneous and resulted in stoppage of work, preparation of new plans and drawings, relocation of the building and delay in construction, with consequent damages to Respondent.

II. Article 4 of the contract required the Contracting Officer to adjust any increase in Respondent's costs resulting

from the discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications". Such conditions were discovered, but the Contracting Officer erroneously ruled as a matter of law that no adjustment should be made under the contract. Respondent was not required to appeal this decision to the head of the Department under Article 15 of the contract, providing for appeals on "questions of fact", and its right to such adjustment was properly submitted to and determined by the Court of Claims.

III. While the Contracting Officer had power to stop the work, the Government is not relieved of liability for consequent damages where the exercise of such power was made necessary by the Government's fault in setting out erroneous specifications.

I.

GOVERNMENT LIABLE FOR EXCESS COSTS WHEN SPECIFIED TIME FOR COMPLETION IS EXTENDED FOR CAUSE FOR WHICH IT IS RESPONSIBLE.

The damages awarded Respondent by the Court of Claims flowed from errors in the specifications as to foundation bearings (R. 23) and the consequent stoppage of work and relocation of the building. That the Government is responsible for such errors and liable in contract for resulting damages follows as an inevitable conclusion, as this Court many times has held.

Cases and text authorities cited by the Government at page 14 of its brief refer to situations where erroneous specifications were not involved, and are squarely distinguished in *United States* v. *Spearin*, 248 U. S. 132, 135, 137, 138, where Justice Brandeis, speaking for the Court said:

> "The general rules of law applicable to these facts are well settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be

excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson* v. *United States*, 172 U. S. 372; *Dermott v. Jones*, 2 Wall. 1. *But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. MacKnight Flintic Stone Co.* v. *The Mayor*, 160 N. Y. 72; *Filbert* v. *Philadelphia*, 181 Pa. St. 530; *Bentley* v. *State*, 73 Wisconsin, 416. See *Sundstrom* v. *New York*, 213 N. Y. 68."

* * *

"But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate."

* * *

"The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work."

* * *

"When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

This rule has been followed in other cases involving like circumstances:

Hollerbach v. *United States*, 233 U. S. 165.
Christie v. *United States*, 237 U. S. 234.
United States v. *Atlantic Dredging Co.*, 253 U. S. 1.
United States v. *Smith*, 256 U. S. 11.

Having made specifications for the foundations, the Government expressly promised in Article 4 of the contract to make good any increased costs which might result from the discovery of materially different subsurface conditions, but even without such an express promise, the Government

would be liable for damages caused by the interruption of Respondent's work, for which it was directly responsible.

United States v. *Smith*, 94 U. S. 214.
Mueller v. *United States*, 113 U. S. 153.

In this case, the Government, by the terms of its contract, did not absolve itself from liability for damages resulting from delays caused by it, as it has in some cases. See *Wood* v. *United States*, 258 U. S. 120.

Respondent Was Prepared to Perform Its Contract Within Time Specified.

In the invitation for bids issued by the Government, which was incorporated in the Specifications (pp. 5a-6a, Def. Exh. H) bidders, including Respondent, were advised that "time of performance will be an essence of the contract", and the Court below so found (Find. 1, R. 18, 19).

Respondent's contract provided that:

> "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction" (R. 7).

and the General Contract provided that:

> "The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed" (R. 19).

Notice to proceed was given to the General Contractor May 9, 1932, and to Respondent May 12, 1932. In the latter notice, Respondent's attention again was directed to the essential character of the time element of the contract as follows:

> "It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract of General Construction. The

General Construction work is due for completion within 250 Calendar Days after May 9, 1932" (R. 20).

Pursuant to advice from the General Contractor that its work would be sufficiently progressed by June 6, 1932, for the commencement of Respondent's work, Respondent moved large quantities of materials and supplies to the job and its Superintendent moved to the job on that date (R. 22-23). On "about June 4" (Saturday), all work on the project had been stopped by order of the General Contractor because of the discovery of subsurface conditions "*materially differing from those shown on the drawings and set forth in the specifications*" (R. 23).

The specifications relating to excavation and foundation work provided that the contractor would "do all necessary excavating *to the dimensions and levels shown on drawings*" (R. 22), but these dimensions and levels proved to be inadequate and insufficient because of the subsurface conditions (R. 23), necessitating the preparation of new plans and drawings and moving the "location of practically the entire building" (R. 23).

The Court below specifically found that:

> "Plaintiff (Respondent) was ready to proceed and perform the *work called for by its contract* at all times on and after the date on which it received notice to proceed." (Find. 4, R. 21.)

This finding follows immediately additional findings in the same paragraph that Respondent before submitting its bid, "being aware of the importance to it of the period for performance," sought the advice of the Contracting Officer and was informed by him "that construction work would commence in the early spring of 1932 as soon as weather conditions would permit so that the building would be under roof and enclosed before cold weather set in during the following months," and that Respondent "made its bid in reliance upon that advice and upon the basis of the provisions of the standard form of contract and the specifications" (R. 20-21.)

Obviously, the finding that Respondent was ready at all times to perform the "*work called for by its contract,*" especially when considered in connection with the findings immediately preceding it relating to time of performance, could only mean that Respondent was prepared to perform its contract within the time specified. This it was prevented from doing by the stop order of the Contracting Officer made necessary by the erroneous specifications for foundation excavation which were prepared by the Government.

In the face of these circumstances, the United States in its brief makes what we believe may be not too harshly described as an absurd statement, that:

> "It is apparent from the contract and offer together that time was considered essential only as to the contractor's agreement to build and not as to any promise by the Government. Cf. *Werner* v. *Zintsmaster*, 61 F. (2d) 298 (C. C. A. 3)" (Br. pp. 13-14.)

The *Werner* case relates to a contract which did not contain a clause that time was of the essence, but did provide that "time of payment shall be an essential part of the contract." In this circumstance, the Circuit Court of Appeals for the Third Circuit very properly held that the parties by the very language employed indicated that the time element was regarded as of the essence only with respect to "time of payment" by the vendee and not to the vendor's engagement to convey.

Time of the Essence of the Contract.

The authorities seem to agree that the question of whether or not time is to be considered of the essence and if so, to which or both of the parties it is to relate, must be gathered from the intention of the parties as expressed by the entire contract.

Bidders having been advised that time was to be of the essence, the instant contract simply states the period of performance, without any indication, as the United States would have this Court assume, that it was a one way obliga-

tion of the Contractor, without any obligation whatsoever on the part of the Government for fixing the time of performance.

Whatever doubt may exist in the matter, however, is dispelled by the provisions of Articles 3 and 4 of the contract, hereinafter more fully discussed, providing that the Contracting Officer *shall* make an "equitable adjustment" of the amount due under the contract and (or) the *time* of performance where changes are made in the drawings or specifications within their general scope (Art. 3, R. 8) and that the cost and (or) difference in *time* resulting from changes in specifications or drawings made necessary by the discovery of subsurface conditions materially differing from those shown in the original specifications or drawings, *shall* be equitably adjusted (Art. 4, R. 8).

If, as Government counsel assert, the Government assumed no responsibility for the fixing of the time of performance, there would be no reason for the mandatory provisions of Articles 3 and 4 of the contract, obviously inserted to protect the Contractor where it was prevented from performing within the specified time by changes or conditions for which the Government was responsible.

Government Warranted that Respondent's Work Under Its Contract Would Not Be Delayed by the Government.

Later in its brief, the Government, after referring to its reserved right to make changes in the plans and specifications (without referring to the corresponding duty to equitably adjust the costs and additional time of performance resulting therefrom) states that:

> "This is a strong indication that the Government was not guaranteeing respondent that the general contractor would complete his work at the time originally specified" (Br. p. 17).

While the Government *may* not have guaranteed to Respondent that the General Contractor would complete his work within the 250 days, it did guarantee to Respondent

that if the General Contractor's time of performance was extended for reasons for which the Government was responsible and Respondent's time was correspondingly extended (it running concurrently with that of the General Contractor), an equitable adjustment would be made in Respondent's "costs", as well as in its time limitation.

The Government urges in one breath that the two contracts must be considered together, when it argues that the Respondent knew its work must proceed in harmony with the general construction and that Respondent thereby contemplated that it would be affected by delays in the work of the General Contractor, and in the next breath, it contends that the two contracts are separate and distinct, when it argues that Respondent had no occasion to rely upon specifications which related to work to be performed by the General Contractor.

In either event, we submit, the responsibility of the Government to Respondent remains the same. If the contracts are joint and inseparable, Respondent had the right to rely upon the sufficiency of the Government's specifications covering excavations and the Government would be directly responsible to Respondent for its excess costs caused by the insufficiency of those specifications. On the other hand, if the two contracts are to be considered wholly unrelated, Respondent had the right to look to the Government, acting through the General Contractor as its agent, to perform the General Construction work without delay and within the time fixed by Respondent's contract or compensate it for its extra costs resulting from any delays in such performance.

Crook Co. vs. United States.

Counsel for the Government again cites and quotes at length from the opinion in *Crook Co.* v. *United States*, 270 U. S. 4. The Court of Claims in the instant case and in many other cases, however, has very properly distinguished the *Crook* case because of the most unusual provisions of the contract there involved.

In that case, this Court held that the Government did not "bind itself to a fixed time for the work to come to an end" and to pay damages for delays extending that period caused by a co-contractor, but the following excerpts taken from the short opinion show clearly that, contrary to the instrument now before the Court, the contract there involved contained many provisions which definitely indicated that the Government assumed no liability with respect to the completion date. This Court said:

> "It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed."
>
> • • • • • • • • • •
>
> "But it was obvious on the face of the contract that this date was provisional."
>
> • • • • • • • • • •
>
> "The contract showed that the specific buildings referred to were in process of construction by contractors *who might not keep up to time.* 'The *approximate* contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918."
>
> • • • • • • • • • •
>
> "But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, *is not without a bearing on what the contract bound the Government to do.*"
>
> • • • • • • • • • •
>
> "The plaintiff agreed to accept in full satisfaction *for all work done under the contract* the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes,"
>
> • • • • • • • • • •
>
> *"The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done."*

Respondent Had the Right to Rely Upon the Representations of Contracting Officer.

The time of year when the instant contract was to be performed was quite material in view of the extreme winter weather experienced in Maine, the site of the project. It is not questioned that the representations of the Contracting Officer in this regard materially affected the bid of Respondent, as well as those of all other bidders. All bids would have been higher if outside construction work during the winter months had been contemplated, and this would have resulted in a higher construction cost to the Government. Certainly the Government does not wish to have contractors disregard such representations in all cases and increase their bids by amounts which would take care of such an eventuality.

Concerning similar representations, Judge Green in the case of *M. H. McCloskey* v. *United States*, 66 Ct. of Cls. 105, 127, after quoting the exception to the parol evidence rule as follows:

> "The rule admitting parol evidence of a collateral agreement is especially applicable where such agreement constituted a part of the consideration of the written agreement, or operated as an inducement for entering into it. * * *"

went on to say:

> "This rule seems to us particularly applicable in the case at bar. Strictly speaking, the parol agreement upon which plaintiff bases its case was a distinct agreement from the written contract, although collateral thereto. It does not vary any of the terms of the written agreement, although in one sense it may be said to enlarge them. The written contract provided that the work was to 'commence' when the site was completely cleared and completed within ten months after the work was begun. If the contract was plain and unambiguous as to the time when the site was to be cleared or the time when the work was to be begun, parol evidence could not be received to contradict it, but such is not the

> case, and we believe parol evidence to be competent to show the inducement to the contract, for certainly the statements made to McCloskey were an inducement to the contract."

This language is equally applicable to the present case and we submit is a correct statement of the law on the subject.

The Government states that these "representations • • • cannot be regarded as warranties of the uninterrupted continuity of the work" (Br. p. 20). It is not so contended by Respondent. We do contend, however, that Respondent did have the right to rely upon such representations in submitting its bid, which later was reduced to a contract.

In any event, the contract for General Construction provided that the work was to consume 250 days and in accordance with the notice to proceed given by the Government was to commence May 9, 1932, and if the work of the General Contractor, as well as that of Respondent, had not been interrupted by causes for which the Government was responsible, the "Hospital building • • • would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932-1933" (R. 24-25), as originally represented by the Contracting Officer.

The breach of contract for which the Government must respond took active form on or about June 4, 1932, when the insufficiency of the Government's specifications and drawings for excavation work was discovered and it became necessary to stop all work, and Respondent is entitled to recover for all damages naturally flowing from that breach, which necessarily includes the increased cost of performing its work in the winter months.

II.

THE GOVERNMENT IS LIABLE TO RESPONDENT UNDER ARTICLE 4 OF THE CONTRACT FOR DELAY RESULTING FROM IMPROPER EXCAVATION SPECIFICATIONS.

Article 4[1] of *Respondent's* contract provided that "should * * * the Government discover * * * subsurface * * * conditions at the site materially differing from those shown on the drawings or indicated in the specifications, * * * the contracting officer shall * * * make such changes * * * as

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[1] Articles 3 and 4 are here quoted in full for convenient reference.

"Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

he may find necessary, and any increase or decrease of *costs* and (or) difference in time resulting from such changes *shall* be adjusted as provided in Article 3 of this contract." The Court below found (R. 30), and the United States does not contend to the contrary, that subsurface conditions were discovered by the Government materially differing from those shown on the drawings and indicated in the specifications. Although a substantial adjustment was made in favor of the General Contractor for its "extra work and delay" caused by this error in the specifications, the United States contends that no adjustment of Respondent's corresponding increased costs can or should be made because the drawings and specifications involved related only to the work to be performed by the General Contractor.

At this point, the Government chooses to treat the two contracts as unrelated and wholly independent of each other. The statements made elsewhere in its brief that "the performance of the claimant is made dependent on that of other contractors"; that "Respondent was to finish at a date not later than that fixed in the General Construction contract and to fit its work to that of the other contractors" (Br. p. 16), and that Respondent's work "was by contract plainly made dependent on that of the general contractor" (Br. p. 37), are disregarded at this stage of the argument.

Breach of Warranty Admitted by Government.

The Government admits that it was liable to the General Contractor for breach of warranty because of the erroneous specifications and cites authorities which fully support that admission, but urges that the warranty did not relate specifically to Respondent's work and therefore can not form the basis of an equitable adjustment under Article 4 of the contract in favor of Respondent.

The fact is that Respondent's work and the time of its performance were wholly dependent upon the progress of the work of the General Contractor and Respondent was

specifically admonished by the provisions of Article 13 of the contract that it must "carefully fit his (its) own work to that provided under other contracts as may be directed by the Contracting Officer".

In the face of these specific provisions in the contract, the Government sees fit to urge, wholly without foundation we submit, that the Respondent should not have had the slightest interest in or concern about the specifications relating to the work to be performed by its co-contractor, and that there is no obligation on the part of the Government to see that Respondent's increased costs, resulting *directly* from the faulty specifications, are equitably adjusted or otherwise compensated for, because such specifications, although closely related to Respondent's work, especially as to date of commencement and time of performance, did not by their terms specifically "affect the nature or amount of his (its) work" (Br. p. 26).

Distinction Between Articles 3 and 4 of the Contract.

The Government cites a number of decisions of the Court of Claims holding that claimants may not recover damages for delays resulting from changes contemplated by Article 3 of the standard form of contract (Br. p. 28), and complains that in another group of cases that Court has found claimants entitled to recover for delays resulting from changes under Article 4 (Br. p. 30), and urges that the two Articles in all essentials are identical and should be similarly construed.

Article 3 relates to changes within the *general scope* of the drawings and specifications and provides for an equitable adjustment in the *amount due under the contract.*

Article 4, however, deals with subsurface and latent conditions *materially differing from those shown or indicated in the plans and specifications* and provides that any increase or decrease in cost (as contrasted with amount due under the contract) "shall be adjusted as provided in Article 3".

In this manner, Article 4 incorporates only the procedural provisions of Article 3 and not its provisions as to the contractor's right to adjustment. For this, we must look to the substantially different provisions of Article 4 alone, which *refer*, not to contemplated changes covered by Article 3, but to unforeseen changes which could not be taken into account in estimating bids.

The distinction between the two Articles is perhaps best and most succinctly described by the Court of Claims in its opinion, quoted in the Government's brief, in *Rust Engineering Co.* v. *United States*, 86 Ct. of Cls. 461, 475, as follows:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. * * *" (Br. pp. 30-31.)

Certainly the discovery of the unexpected subsurface conditions, the necessity for completely relocating the building, the preparation of new plans and drawings, the extra time consumed in excavating for the new foundations and the necessity for proceeding with the outside work during the winter months, were not within the contemplation of the Government or Respondent at the time its contract was executed, and Respondent had every right to believe that if such unforeseen conditions arose, its cost resulting therefrom (not the amount due under its contract) would be equitably adjusted.

There was never any attempt to reach a conclusion between Respondent and the Contracting Officer as to the *amount* of Respondent's increased costs, for the reason that when Respondent timely, and within the procedural re-

quirement of Article 3, incorporated into Article 4 by reference, protested that it should not be required to proceed with the work under its contract unless and until an equitable adjustment of its costs was made, the Contracting Officer ruled that:

> "as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff (Respondent) would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred" (R. 24).

With this ruling, Respondent chose the logical alternative and proceeded with its work, subject to the right to present its claim for increased costs to the Court of Claims upon completion of the contract.

Respondent could have regarded the contract as breached when its work was stopped due to the faulty specifications and it was refused an equitable adjustment of its extra costs caused thereby, thereafter litigating its claim for damages in the Court of Claims. *United States* v. *Spearin*, 248 U. S. 132. Contrary to the contention of the United States (Br. p. 25), it would not have been prevented from so doing by the terms of Article 3;

> "But nothing provided in *this* Article shall excuse the contractor from proceeding with the prosecution of the work so changed,"

such provision having reference only to reasonably anticipated changes contemplated in Article 3 and not to changes caused by unusual and unexpected conditions referred to in Article 4.

It is also said that the Court of Claims decisions holding the Government liable for delays resulting from changes under Article 4 of the standard form of contract are con-

trary to the decision of this Court in *Chouteau v. United States*, 95 U. S. 61, 68. In that case, this Court found that claimant was not entitled to losses sustained as the result of a rise in labor and material prices in the period following a delay caused by changes in specifications which were reasonably contemplated by the parties, saying:

> "It is one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices."

A rise in labor and material costs, which might well have been a reduction of such costs instead, depending upon general economic conditions, is a gamble to which both parties to all construction contracts are exposed. But that is a far different thing from out of pocket costs directly resulting from and relating to changes in the specifications, necessitated by unusual and unexpected conditions, referred to in Article 4 of the standard form of contract.

Respondent Not Precluded from Recovery by Failure to Appeal to Head of Department.

It is urged by the United States in this Court, for the first time, the point not having been presented to or decided by the Court below, that Respondent is precluded from recovering for failure to appeal in writing to the head of the department within 30 days from the decision of the Contracting Officer, as provided in Article 15 of the contract.

Article 4 provides that increased costs shall be adjusted in accordance with the procedure outlined in Article 3, as above set forth, and Article 3 provides that if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15.

However, Article 15 provides as follows:

> "Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning *questions of fact* arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the

> contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such *questions of fact.* In the meantime the contractor shall diligently proceed with the work as directed." (R. 12.)

It will be noted that both the necessity for appeal to the head of the department and the finality of his decision relate only to decisions of the Contracting Officer on *questions of fact.* Obviously, the parties to the contract have not agreed that *questions of law* involved in rulings of the Contracting Officer must be appealed to the head of the department and that the determination of such questions by the head of the department shall be *final and conclusive,* and Respondent, by consenting to that provision of the contract, certainly has not precluded itself from securing a proper determination by a court of law on questions of law arising under its contract.

In this connection, it must be borne in mind that the question decided by the Contracting Officer and now before this Court is not *what* adjustment should be made under Article 4 of the contract, but whether or not the contract permitted the making of *any* adjustment. The Contracting Officer ruled, with what we think is obvious error, that *no* adjustment could be made in favor of Respondent, because Respondent at the time work was suspended by his order had not performed any work under its contract (R. 24), presumably meaning that it had not physically made any installations in the building, although considerable preliminary work had been done (R. 22-23). It would be assumed from this ruling that had Respondent made even the slightest installation under its contract, the Contracting Officer would have made an equitable adjustment of Respondent's costs resulting from the delay incident to the relocation of the building. However, the Government does not found its contention upon the reason given by the Contracting Officer, but insists that no equitable adjustment should be made in favor of Respondent, regardless of whether or not its work had been commenced prior to the stop order.

The question of the application of Article 15 in the standard form of contract to circumstances similar to those here involved has been fully presented to and decided by the Court of Claims in the case of *Callahan Walker Construction Co.* v. *United States*, No. 43102 (decided January 5, 1942) and now before this Court for review.

In a well reasoned opinion written by Judge Green in that case, the Court of Claims finds that the procedure outlined in Article 15 for appeal to the head of the department relates only to questions of fact and not to questions of law, and that the determination of whether or not under the terms of the contract an equitable adjustment is to be made is a question of law. Judge Green says:

> "We think it has been shown above that he was not deciding a question of fact and that his order cannot be so construed. He did, in effect, assert that the contract rate applied to the additional work ordered but this involved a question of law which he had no authority to decide. We have also held above that he not only did not make an equitable adjustment but made no adjustment whatever."
>
> . . . . . .
>
> "As no adjustment was made of the additional cost, the plaintiff under all of the authorities was not obliged to take an appeal or even to protest and without an appeal could bring suit to recover on an implied contract the reasonable value of the work. The plaintiff, however, did protest against the decision of the contracting officer that payment would be made under the contract rate."

As Judge Green also points out, this Court in two recent cases, *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119, and *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 452, has held that what constitutes an "equitable adjustment" is a question of law, and if that is so, certainly the question of whether or not under the terms of a statute or under the conditions of a contract as here, any adjustment is to be made is more certainly a question of law.

It would indeed be unfortunate, and we submit totally unwarranted, to hold that the parties to a contract, by inference and an involved process of reasoning, have ousted the Courts of jurisdiction to determine questions of law arising out of a contract and have relegated themselves unqualifiedly to the acceptance of the decision of a Contracting Officer and the head of a Department in matters requiring judicial consideration and determination.

III.

GOVERNMENT'S POWER TO ISSUE STOP ORDER DID NOT RELIEVE IT OF LIABILITY FOR THE BREACH OF WARRANTY.

As a final contention (Br. p. 36), the Government says that it should not be liable because Article 8(g) of the Standard Specifications authorized the suspension. The *power* to suspend was undoubtedly present. In fact, not to suspend in the face of "soft sand, and a great deal of water and quicksand" would have been folly. But this exercise of the Government's *power* to suspend does not relieve it of liability either under general law or under Article 4 of the contract, to adjust the increase in Respondent's costs. The Government is still responsible for the defect in specifications which made the suspension necessary and for Respondent's resulting damage.

CONCLUSION.

It is therefore respectfully submitted that the Court of Claims correctly awarded damages to Respondent for the Government's breach of its contract and that the judgment of the Court of Claims should be affirmed.

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pp. 6+5

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1942.

The United States of America, Petitioner, *vs.* Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc.	On Writ of Certiorari to the Court of Claims.

[November 9, 1942.]

Mr. Justice Black delivered the opinion of the Court.

We granted certiorari to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract in *Crook* v. *United States*, 270 U. S. 4.

Respondent agreed to install plumbing, heating, and electrical equipment in a Veterans' Home to be erected at Togus, Maine, while another contractor was to do the general work of preparing the site and constructing the building. Respondent agreed, for a stipulated price, to begin work upon notice to proceed and to finish by the time the work had been completed by the principal contractor. If respondent failed to complete the work within the time thus set, the government was entitled to terminate the contract or to require the payment of liquidated damages. The length of time allowed the principal contractor under his contract, subject to certain qualifications discussed below, was 250 days, and it was into this schedule that respondent was to coordinate his own activity.

The government gave notice to the general contractor to begin work on May 9, 1932. On May 12, respondent was notified to begin and early in June its superintendent arrived in Maine with tools and equipment. Upon his arrival he found that the general contractor had been stopped by the government because of the unexpected discovery of an unsuitable soil condition. It became necessary to change the site of the building and to alter the specifications, and because of the delay attendant upon preparing a new

foundation, respondent was unable to begin work until October. As a consequence, overhead expenses accumulated during the period of delay, and much of the work which respondent's employees otherwise would have done either during warm weather or after the building was enclosed was done outside in cold weather.

Because of the delay and pursuant to the adjustment clauses of the contract the government extended the time of performance by respondent and because of structural changes, it re-adjusted the amount due. It increased payments to the principal contractor, reduced the payment to respondent by about $1,000 because of construction economies under the new plans, and waived any claim to liquidated damages for the period of the extension. The hospital was completed some months after it would have been finished had it not been for the change of plan.

The respondent was paid the full amount agreed on for the work it did. It then sued for about $26,000 for damages alleged to have been suffered due to delay for which the government was responsible. The Court of Claims held the government was liable for damages resulting solely from delay, but found that $13,600 of the alleged loss was due to respondent's own faulty estimate and financial conditions, and that $3,000 of it was caused by respondent's and the principal contractor's delays. Respondent sought no review of denial of this part of its claim. However, the court concluded that the balance claimed, $9,349, arose from overhead costs during the summer of 1932 when the new foundation was being prepared and from a decrease in labor effectiveness resulting because much of the work had to be done outside in cold weather. The judgment rendered under this conclusion is what we have before us.

The chief issues of the case are whether the delay in commencing the construction was a breach of contract by the government; whether, regardless of the answer to that question, respondent was entitled to an equitable adjustment for damages resulting from the delay, in addition to the extension of time already granted; and whether respondent is barred from any recovery because he failed to appeal certain decisions affecting his contract to the chief officer of the department. Under the view we take of the first two of these questions, it is unnecessary to answer the third.

I

The government contends, as it did in the *Crook* case, *supra*, that the change in specifications resulting in delay was not a breach

of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the government was required to do no more than grant an extension of time. Put another way, the government concedes that if an alteration of plan required respondent to use an extra 50 tons of steel, the government would be liable for the value of the steel and the cost of installation; but it argues that under the terms of this contract an extension of time should be accepted as full equitable adjustment for all damages caused by the fact that the work was done at the later period made necessary by the permitted change. Essentially it repeats the doctrine of *Chouteau* v. *United States*, 95 U. S. 61, 68: "For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made."

We agree with this view. We do not think the terms of the contract bound the government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the government. The contractor was absolved from payment of prescribed liquidated damages for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *H. E. Crook Company, Inc.* v. *United States*, *supra*, 6. Decisions of this Court prior to the *Crook* case also make it clear that contracts such as this do not bind the government to have the property ready for work by a contractor at a particular time. *Wells Bros.* v. *United States*, 254 U. S. 83, 86; *Chouteau* v. *United States*, *supra*; cf. *United States* v. *Smith*, 94 U. S. 214, 217.

As pointed out, the delay here resulted from a change in specifications made necessary by discovery of soil unsuitable for foundation purposes. The government having reserved the right to make such changes upon discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated by the specifications", delays incident to the permitted changes cannot amount to a breach of contract. If there are rights to recover damages where the government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties.

II. Two of the Judges of the Court of Claims thought consequential damages resulting from delay were recoverable under paragraphs 4 and 3 of the contract. These paragraphs[1] deal with closely related problems. Article 3, entitled "Changes", governs the procedure under which the government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions", governs the procedure under which the government may alter the contract to meet unanticipated physical conditions. Article 4 incorporates by reference the same machinery of adjustment as that specified in article 3. Both clauses essentially provide that if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made.

Clearly questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them. Clause 4 was added to the standard form contract since clause 3, and we therefore turn first to decisions interpreting the latter clause. The

[1] "Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . .

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

Court of Claims, relying on principles announced in the *Chouteau*, *Wells*, and *Crook* cases, *supra*, has uniformly held that the "increase or decrease of cost" language in Sec. 3, and in similar clauses, is not broad enough to include damages for delay; that "It was never contemplated . . . that delays incident to changes would subject the government to damage beyond that involved in the changes themselves." *Moran Bros.* v. *United States*, 61 Ct. Cls. 73, 102; and for the same view, see *McCord* v. *United States*, 9 Ct. Cls. 155, 169; *Swift et al.* v. *United States*, 14 Ct. Cls. 208, 231; *Griffiths* v. *United States*, 74 Ct. Cls. 245, 255.

Were this a matter of first impression, we would again come to the same conclusion regarding this clause. It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease . . . in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision. The provision as to time serves the large purpose of removing from persons in the position of respondent liability for "delay" beyond the stipulated date for which ~~it~~ they might otherwise have ~~its~~ their contract terminated or might be required to pay liquidated damages without fault.

Despite the similarity of the two clauses, a minority of the court below has in this instance concluded that they may be distinguished and that respondent is entitled to damages for delay under clause 4. In supporting this view, respondents here rely primarily on *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461, 475, where the court below distinguishes the two clauses by saying that the type of change contemplated in clause 4 is more basic than that under clause 3, and that therefore different liabilities should attach:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contem-

plation of either party to the contract at the time it was made. . . . ."

And see *Sobel* v. *United States*, 88 Ct. Cls. 149, 165.

No such strained distinction between paragraphs 3 and 4 can stand. It does not help to argue that the changes made under clause 4 "are not within the contemplation of either party", since the changes made under clause 3 are also not contemplated in advance. Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. For delays incident to such unanticipated changes, the contractor was under either section to be granted a "compensating extension of time." *Wells* v. *United States, supra*, 86.

In this case there were two consequences of the discovery that the Home could not be built as originally planned. One was an alteration of specifications, which resulted in slight cut in respondent's outlay and in his compensation. The other was the delay itself and for this the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. Under the terms of the contract, it is entitled to no more.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.